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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 1151

SAX and ROSE ELIZABETH ROHMER,
Petitioners,

—against—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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THE COURT PRESS, N. Y. C.

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IN THE

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No. .

SAX and ROSE ELIZABETH ROHMER,
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—against—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Sax and Rose Elizabeth Rohmer, respectfully pray that a writ of certiorari issue to review an order, judgment and decree of the United States Circuit Court of Appeals for the Second Circuit, entered January 3, 1946, affirming the order of the Tax Court entered June 6, 1945. A timely petition for rehearing was filed, which was denied on January 25, 1946. A certified transcript of the record is furnished herewith in accordance with Rule 38, Par. 1, of the Rules of this Court.

Statement.

All the pertinent facts are set forth in the Tax Court's opinion (R. 11-18). In 1940, the taxpayer Sax Rohmer, a non-resident alien not doing business in the United States, transferred the American serial rights in his story "The Island of Fu Manchu" to Macfadden Publications, Inc., without limitation of time, for $10,000. He claims that said payment was not taxable, because (a) it was the proceeds of the sale of property and (b) because in any event it was not "fixed or determinable annual or periodical * * * income", which alone would be taxable to Rohmer under the 1940 Revenue Act. (See Appendix for pertinent provisions.)

Jurisdiction.

Jurisdiction of this Court is invoked under Judicial Code, §240-(a), as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. §348-(a)). The date of the order, judgment and decree of the Circuit Court of Appeals for the Second Circuit to be reviewed was January 3, 1946, petition for rehearing denied January 25, 1946.

Question Presented.

Was the $10,000 payment to Rohmer for the serial rights "periodical" income under Sec. 211 (a)(1)(A) of the Internal Revenue Code?

Reasons Relied Upon for Allowance by the Court.

1. The Circuit Court of Appeals has decided an important question of Federal law which has not been,

but should be, settled by this Court, in that it has determined that non-periodical payments for serial rights of publication in the United States are taxable to non-resident aliens not doing business in the United States as "annual or periodical gains, profits and income" under Sec. 211(a)(1)(A) of the Internal Revenue Code.

2. Its decision further contains an express warning to the bar that contingent proceeds of sale are taxable to such aliens, in conflict with a decision of the Circuit Court of Appeals for the District of Columbia.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Judicial Circuit, sitting at New York, New York, commanding said Court to certify and send up to this Court, on a date to be designated, a full and complete transcript of the record and of all proceedings in the Circuit Court of Appeals had in this case, to the end that this case may be reviewed and determined by this Court; that the order, judgment and decree of the Circuit Court of Appeals be reversed; and that your petitioners be granted such other and further relief as may seem proper.

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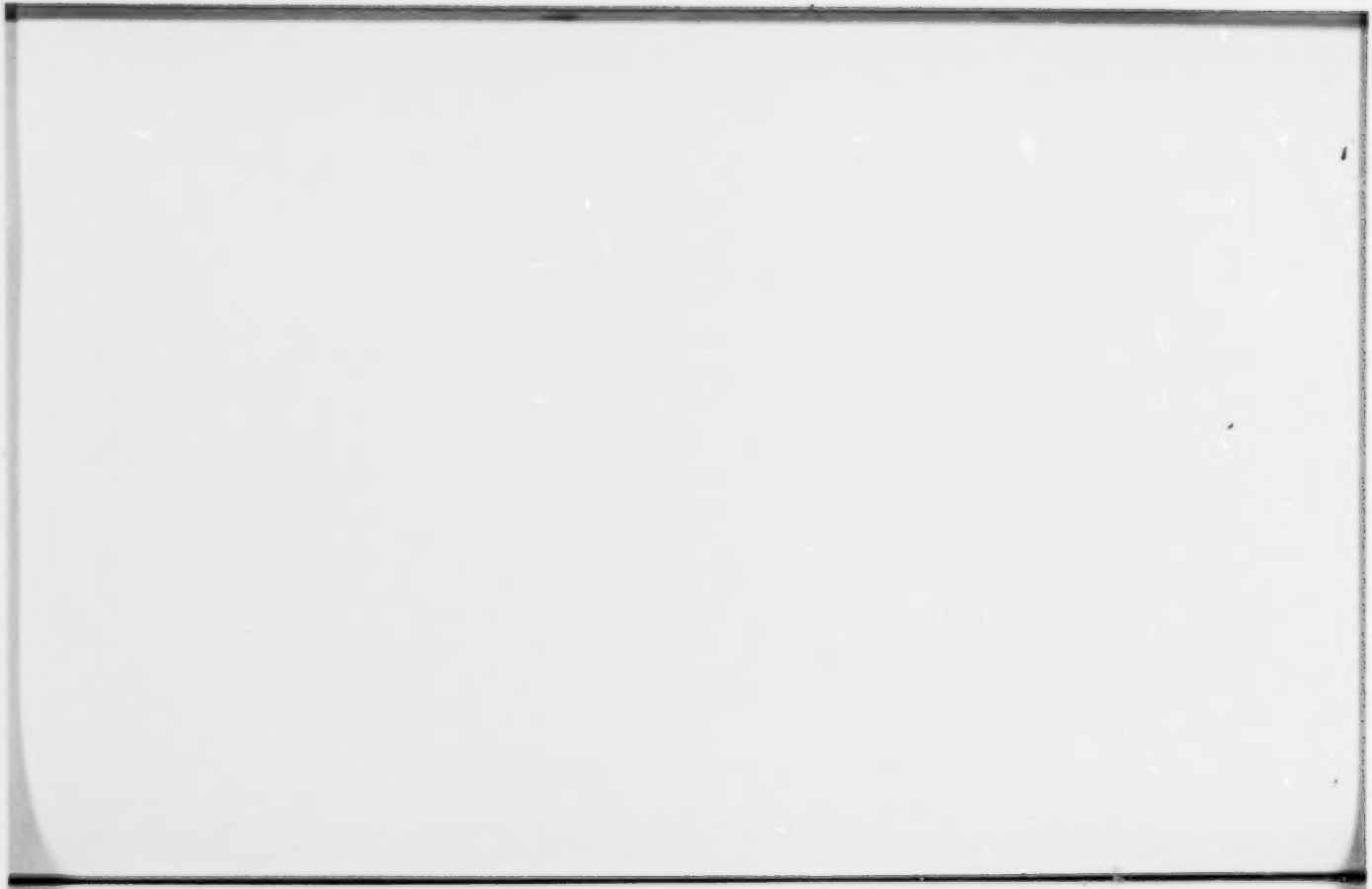
April 20, 1946.



IN THE

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OCTOBER TERM, 1945.

No. .

SAX and ROSE ELIZABETH ROHMER,
Petitioners,

—against—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION.

1. The transfer of all serial rights of publication without any limitation of time, for a fixed sum, is not "fixed or determinable annual or periodical gains, profits and income" under Sec. 211(a)(1)(A) of the Internal Revenue Code, and hence is not taxable to the taxpayer Rohmer, a non-resident alien not engaged in business in the United States.

Prior to this decision, which threatens inextricable confusion, the taxability of non-resident aliens not in business here, like Rohmer, under the radically simplified provisions in effect since the 1936 Revenue Act, seemed to present little difficulty, in view of the plain wording of the Statute and Treasury Regulations, and the relevant decisions of the Circuit Courts of Appeals.

Before 1936, non-resident aliens were taxed on all income from United States sources. The 1936 Act lim-

ited the liability of Rohmer's class of alien to their income *subject to withholding at the source,* and carried into the *taxing* section—I. R. C. Sec. 211(a)(1)(A)—the precise wording of the *withholding* section—I. R. C. Sec. 143(b). (See Appendix.) The only change made in both sections from the *withholding* section of prior Acts was the addition of *dividends* to the classifications of income now subject to tax and withholding, making both sections apply to "interest * * * dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, *or other fixed or determinable annual or periodical gains, profits and income.*" (Italics in quotations are ours unless otherwise indicated.)

Ever since the above wording (except for *dividends*) was first adopted in the 1918 Act, the successive Treasury Regulations on withholding have uniformly begun with the words, "Only fixed or determinable annual or periodical income is subject to withholding." Reg. 103 and Reg. 111, Sec. 19.143-2, so begin.

Proceeds of the *sale of property* were never subject to *withholding,* and accordingly a non-resident alien's taxable income since 1936 does not include "profits derived from the sale within the United States of personal property or real property located therein." Reg. 103, Sec. 19.215-1.

The Second Circuit Court of Appeals held on January 3, 1944 in *General Aniline & Film Corp.* v. *Commissioner,* 139 Fed. (2d) 759, that down payments for patent rights, not contingent on future profits, were not taxable to this class of taxpayer, regardless whether title to the patent had passed to the assignee. The Court left open the question whether the future contingent profits would be taxable.

This question was answered in the negative two weeks later by the Court of Appeals for the District of Columbia in *Commissioner* v. *Celanese Corporation,* 140 Fed. (2d) 339, where the Court pointed out that income from the sale of any kind of property (including a patent) is not fixed or determinable annual or periodical income, and hence cannot be taxed to such non-resident aliens, whether it is contingent on future profits or not.

Shortly thereafter, the majority of the Second Circuit Court of Appeals in *Goldsmith* v. *Commissioner,* 143 Fed. (2d) 466, cert. denied 323 U. S. 774, expressed the view that the grant of exclusive motion picture rights in a copyrighted play without limitation of time was a *sale,* but not of capital assets as defined in Revenue Act, 1938, Sec. 117(a)(1).

These decisions seemed to form a logical pattern of interpretation of the new method of taxing non-resident aliens inaugurated in 1936, despite some contrary decisions of the Tax Court and a New York Federal District Court to the effect that any grant of rights less than the whole copyright must generate *royalties,* which in turn must be taxable whether periodical or not. *Irving Berlin,* 42 B. T. A. 668; *Estate of Marton,* 47 B. T. A. 184; *Ehrlich* v. *Higgins,* 52 Fed. Supp. 805. These lower court decisions relied on *Sabatini* v. *Commissioner* (C. C. A. 2d), 98 Fed. (2d) 753, which held that *prior to 1936* a lump sum payment for motion picture rights *for a ten-year period* was a royalty, and hence *taxable*; *withholding* was not involved, and hence the Court did not pass upon or even mention whether this *royalty* was periodical or not. As to a grant of motion picture rights

unlimited in time, the opinion of the majority of the same Court in *Goldsmith* v. *Commissioner, supra,* held that this was in fact a *sale* under Sec. 117 (relating to capital gains), though Judge Chase, who had written the *Sabatini* opinion, still adhered to the view that it was a mere *license* giving rise to *royalty*; no question of periodicity was involved or discussed.

The present decision, in which the Second Circuit in effect overrules its *General Aniline & Film* decision; distinguishes its *Goldsmith* decision by giving the simple concept of "sale" an opposite meaning in two sections of the Internal Revenue Code; sets up a novel criterion of "sale" by non-resident aliens, depending not on transfer of title but on transfer of substantially all rights, what is "substantial" to be determined from case to case; and ends with an extraordinary warning to the bar in footnote 15 that the Court will probably hold taxable contingent payments even after a complete sale. That this last warning implies a direct conflict with the Court of Appeals for the District of Columbia appears even more clearly from the statement in this footnote that "*Commissioner* v. *Hopkinson,* 126 Fed. (2d) 406 (C. C. A. 2), did not involve the portions of the Act imposing a tax on aliens;" this case, which held that contingent proceeds based on future sales after title to a patent passed were taxable as capital gains, not as royalties, was cited in *Commissioner* v. *Celanese Corporation, supra,* as authority for its decision as to the tax on aliens, to which the Second Circuit now warns it did not apply.

The sole ground on which the Court justifies its new position that royalties which it concedes are not *annual or periodical* are still taxable is the "legis-

lative history" of Sec. 211(a)(1)(A), which it says "was not called to our attention before we decided the *General Aniline* case". This "legislative history", the opinion reveals, consists only of the reports of the Congressional Committees on the 1936 Act. (See Appendix for the Senate Report, which is substantially the same as the House Report.) If these reports in fact were susceptible of the Court's construction of them, it is strange that their import was overlooked in all the Treasury Regulations issued since 1936, and also in 1943 in the Government's presentation of the *General Aniline* case, which involved a large amount of tax. The supposed "legislative history" seems to have been a ten years' afterthought on the part of the Government.

The Committee Reports actually seem to lend no support to the construction now placed on them.

When Congress in the 1936 Act adopted for the *taxing* of this class of non-resident aliens the precise language used in the *withholding* section for eighteen years before, *ipsissimis verbis,* with the addition of the single word "dividends", it is too plain for argument that (with that single change) Congress intended in future to tax such persons *only* on income previously subject to *withholding.* And both Senate and House Committee Reports state that this tax *"is collected at the source by withholding as provided for in section 143"*. [S. Rep. No. 2156, 74th Cong., 2d Sess., pp. 21, 23 (1939-1 Cum. Bull. (Part 2) 678, 691-693); H. Rep. No. 2475, 74th Cong., 2d Sess., p. 9 (1939-1 Cum. Bull. (Part 2) 667).]

The Senate Finance Committee's Report briefly describes the taxable income as "income from interest, dividends, rents, wages and salaries and other fixed

and determinable income", while the full wording of the statute is:

> "interest *(except interest on deposits with persons carrying on the banking business),* dividends, rents, salaries, wages, *premiums, annuities, compensations, remunerations, emoluments,* or other fixed *or* determinable *annual or periodical gains, profits, and* income."

It is the casual compression of the statutory words "fixed or determinable annual or periodical gains, profits and income" into "fixed and determinable income" upon which this Court seemingly relies to delete from the statute the words *"annual or periodical"*, which had been the heart of the withholding section for eighteen years, *and still is.*

It would seem no more absurd for a taxpayer to claim that "premiums, annuities, compensations, remunerations, emoluments" [words used in the statute—Secs. 143(b) and 211(a)(1)(A)] were no longer intended to be taxed because omitted in the Committee's cursory summary, than for the Government to contend that the Committee meant thus casually to cut out the core of the section—the *annual or periodical nature* of all the different types of income specified.

To interpret the words *"fixed and determinable"* as having some independent meaning except as a mere abbreviation of the full statutory language reduces them to a tautology of little meaning. Every kind of taxable income which is "fixed" is already "determined".

The words "other fixed *or* determinable gains, profits and income" have been used in the "informa-

tion at source" section of the Revenue Acts (now I. R. C., Sec. 147) since 1918. Their difference in meaning from the more restricted coverage of the withholding section (143) has been well recognized ever since. Treasury Regulations 103 (1940 Act), Sec. 19.147-1, says:

> "Although to make necessary a return of information the income *must be fixed or determinable, it need not be annual or periodical.*"

The Regulations from 1918 to date contain identical language.

But even if the House and Senate Committees had used the words "fixed *or* determinable income", we do not believe anyone would have thought (prior to this case) that they thereby effected the substitution of the "information at source" provisions with their entirely separate elaborate machinery for the "withholding at source" ones, while at the same time incorporating the latter and not the former in the Revenue Act itself!

The Senate Finance Committee's Report does not pretend or need to have statutory precision. Its use of the phrase *"fixed and determinable"*, which is self-contradictory *per se,* is understandable as a short-cut reference to the well known language of the withholding provision; it would seem unthinkable as evidencing an intention to modify in any respect, much less to change the whole letter and spirit of the withholding provisions, *then already of 18 years' standing.*

What the Senate Committee's Report shows beyond peradventure is the intent of Congress to eliminate all tax liability of this class of aliens except income *subject to the existing withholding provisions.* This was because *"in many cases"* (not in all cases) the

tax was hard to collect otherwise. Congress did not attempt further to redefine or reclassify any type of income on account of relative difficulty of collection; obviously the tax on profits on *land* sold in the United States, for example, could readily be collected, but Congress preferred to overlook such refinements, and proceeded on the theory that no attempt would be made in future to collect any tax from such aliens *directly,* but only *through withholding agents,* in accordance with existing law.

One *specific* change was made in 1936 in the previous withholding provisions, and duly noted in the Senate Finance Committee's Report. This was the elimination of the previous exemption of *dividends* from withholding. The specific inclusion naturally negatives any *implied* additional inclusion of non-periodic royalties.

Since the decision below, the Treasury Department has issued I. T. 3781, Bull. Ref. 1946-3-12228 (p. 14), holding that amounts distributed in a reorganization which are taxable as dividends under Sec. 112(c)(2) of the Internal Revenue Code do not constitute dividends or other fixed or determinable annual or periodical income under Sec. 143(b) and are not subject to withholding. The ruling thus re-affirms that not all income of the types specified in the Code is taxable, but only that which is also periodical. *A fortiori* this applies to *royalties,* which are not named in the Code at all, but only in the Regulations—an inclusion only justifiable in the case of *periodical* royalties. This latest ruling seems inconsistent with *De Nobili Cigar Co.* v. *Commissioner* (C. C. A. 2), 143 Fed. (2d) 436, which held Sec. 115(a) distributions subject to withholding, but that aspect is

immaterial here, except to emphasize the inextricable confusion in which the simplified procedure intended by Congress in 1936 is now involved, which can only be clarified by this Court.

The opinion below quotes the Committees' statement of their belief that the revision "will be productive of substantial amounts of additional revenue". This is fully explained, we respectfully submit, by the further explanatory statement in the Senate Report that larger stock transactions would produce more taxes, and that *"the principal increase in revenue will result, however, from withholding tax on dividends heretofore not required"*. Further, it was self-evident that the increase in the flat rate of tax on both individuals and corporations of this class, the disallowance of all deductions, and the total abolition of the personal exemption theretofore enjoyed by all such individuals, would add substantially to the revenue. There is not a word anywhere in the Reports, or in any other legislative record so far as we have found, to suggest that the Committees or Congress expected to get more revenues by subjecting to withholding forms of income not theretofore so subject, *with the single and express exception of dividends.*

Further proof that the Congressional Committees had no intention of singling out non-periodic payments to authors for special taxation may be found in the status of the *Sabatini* case in 1936. In December, 1933, I. T. 2735, C. B. XII-2, 131, had held that "sales" of U. S. serial and motion picture rights were really *"licenses"*, and hence that payments therefor were taxable as royalties. This ruling dealt solely with *Sec. 119* of the Revenue Act—*Income from*

Sources within the United States—and never even mentioned "withholding", nor did its reasoning touch upon witholding in any way. But this ruling was disapproved in *Sabatini,* 32 B. T. A. 705, in 1935, which was not reversed on this point in *Sabatini* v. *Commissioner, supra,* until 1938. If Congress or its Committees gave the question any consideration in 1936, they would have found that under the decision of the highest administrative authority in the Treasury Department such transactions were *sales,* and hence that their proceeds would apparently be tax free under the 1936 Act on any theory.

Departmental practice was, if possible, even more emphatic than the Revenue Acts in upholding the requirement of recurrence.

The opinion below notes that "the Treasury Regulations, under the successive Acts from 1918 to 1934 inclusive, provided that the withholding provisions excluded income derived from the sale of property but included 'royalties'." But there is no intimation in any of these Treasury Regulations that *all* royalties are subject to withholding. The language of Reg. 86 (1934 Act), Reg. 94 (1936 Act) and Reg. 103 (1940 Act) as to withholding are exactly alike as to *royalties.* Art. 143-2 in each begins with the axiom: "*Only fixed or determinable annual or periodical income is subject to withholding.*" Then after listing the statutory provisions it concludes: "But other types of income are included, as, for instance, royalties." Art. 211-7(a) of Reg. 94 and 103 paraphrases the same thought as follows: "* * * *but other fixed or determinable annual or periodical gains, profits and income are also subject to the tax, as, for instance, royalties.*" The fact that Treasury Regulations 94

and 103 use the same verbiage in describing the taxable income of non-resident aliens as they and previous Regulations had used for nearly twenty years as to withholding, seems another conclusive proof that no change was contemplated by Congress in 1936 in the requirement that only periodical income was subject to withholding.

Further proof that not all royalties were subject to withholding is found in the amendment to Reg. 86, Art. 143-2, made March 16, 1935 by Treasury Decision 4535. This added "dividends" to the concluding sentence quoted above making it read: "But other types of income are included, as, for instance, royalties *and dividends.*" The significance of this is that prior to the 1936 Act the majority of dividends were not subject to withholding, but *some* were, and accordingly the Treasury Regulations grouped them in the same category with royalties. It would seem that royalties based on percentages of sales are as obvious an example of periodical income as a once-for-all-time payment for a perpetual license is of non-periodical income. The opinion below relies on the analogy of "interest paid for several years in one sum or rent paid in advance for the use of a building for a period of years." But is not the analogy here rather to the purchase of a perpetual easement for a fixed sum?

The Treasury rulings of lesser authority than the Regulations tell the same confirmatory story of the primary importance of periodicity, only in more detail:

> Bulletin "B" on "Withholding", first published by the Internal Revenue Bureau in 1920, under the 1918 Act, revised July 1, 1927, under the

1926 Act (stressing payments "from time to time");

S. M. 975 (1919) C. B. 1, p. 184 (winnings on horse races not subject to withholding);

L. O. 1024 (1920) C. B. 2, p. 189 (discount, though much like interest, is not subject to withholding; cited with approval this year in *I. T. 3781, supra*);

O. D. 907 (1921) C. B. 4, p. 232 (commission on single transaction not "fixed or determinable annual or periodical income");

Internal Revenue News, May, 1931 (p. 3) (periodical royalties subject to withholding; not so sale for a lump sum);

I. T. 2624, XI-1 C. B. 122 (1932) (book royalties subject to withholding);

G. C. M. 21,575, C. B. 1939-2, p. 172 (art prizes not "fixed or determinable annual or periodical income"; citing *S. M. 975* and *O. D. 907, supra*; cited with approval this year in *I. T. 3781, supra*).

As to the recent decisions of this Court stressing legislative history cited in note 13 of the opinion below, none of them involved taxes, and if there were doubt here as to the legislative intent to tax *only annual or periodical income previously subject to withholding,* the doubt seemingly should be resolved in favor of the taxpayers. *Bowers* v. *New York & Albany Company,* 273 U. S. 346, 350, cited with approval in the unanimous decision of the Supreme Court in *Guaranty Trust Company* v. *U. S.,* 304 U. S. 126, 135.

2. Failure to review this case will encourage litigation in all Circuits, not only as to future payments of this class, but also as to payments made by American citizens to aliens since 1936, without withholding, in reliance on the plain words of the statute.

The emphatic warning to the bar in the opinion below (footnote 15), though it may be only a solemn dictum in conflict with the decision of the Court of Appeals for the District of Columbia in *Commissioner* v. *Celanese Corporation, supra,* seems as a practical matter to be quite as well calculated to create uncertainty as would be a square holding to the same effect.

If such a fundamental concept as a "sale" is to be construed differently in two sections of the Revenue Act, and words of such plain meaning as "annual or periodical" are to be entirely expunged by such a retroactive decision at this late date, we respectfully submit that such an extraordinary result should at least be reached only after a full presentation to this Court. This seems particularly appropriate when the Court below admits that its conclusion is not crystal-clear; and seems by its reliance on the assumed authority of this Court's recent rulings, to place the responsibility for the result upon this Court.

It is clear that the question is of importance to thousands of non-resident authors, and equally so to the American withholding agents, who must decide the question in each case at their peril. Pending a clarifying decision of this Court, the inevitable consequence must be a multiplicity of litigation in every Circuit.

CONCLUSION.

For the reasons stated, it is submitted that the decision of the Circuit Court of Appeals is erroneous; that it involves an important question of Federal law which has not been, but should be, settled by this Court; and that the petition for certiorari should be granted.

Respectfully submitted,

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April 20, 1946.

APPENDIX.

Internal Revenue Code:

SEC. 119. INCOME FROM SOURCES WITHIN UNITED STATES.

(a) *Gross Income from Sources in United States.*—The following items of gross income shall be treated as income from sources within the United States:

* * * * *

(4) *Rentals and royalties.*—Rentals or royalties from property located in the United States or from any interest in such property, including rentals or royalties for the use of or for the privilege of using in the United States, patents, copyrights, secret processes and formulas, good will, trade-marks, trade brands, franchises, and other like property; and

(5) *Sale of real property.*—Gains, profits, and income from the sale of real property located in the United States.

(6) *Sale of personal property.*—

For gains, profits, and income from the sale of personal property, see subsection (e).

(c) *Gross Income from Sources Without United States.*—The following items of gross income shall be treated as income from sources without the United States:

* * * * *

(4) Rentals or royalties from property located without the United States or from any interest in such property, including rentals or royalties for

the use of or for the privilege of using without the United States, patents, copyrights, secret processes and formulas, good will, trade-marks, trade brands, franchises, and other like properties; * * *

* * * * *

(26 U. S. C. 1940 ed., Sec. 119.)

SEC. 143. [As amended by Sec. 5 of the Revenue Act of 1940, c. 419, 54 Stat. 516]. WITHHOLDING OF TAX AT SOURCE.

* * * * *

(b) *Nonresident Aliens.*—All persons, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, employers, and all officers and employees of the United States, having the control, receipt, custody, disposal, or payment of interest (except interest on deposits with persons carrying on the banking business paid to persons not engaged in business in the United States and not having an office or place of business therein), dividends, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income (but only to the extent that any of the above items constitutes gross income from sources within the United States), of any nonresident alien individual, or of any partnership not engaged in trade or business within the United States and not having any office or place of business therein and composed in whole or in part of nonresident aliens, shall (except in the cases provided for in subsection (a) of this section and except as otherwise provided in regulations prescribed by the Commissioner under sec-

tion 215) deduct and withhold from such annual or periodical gains, profits, and income a tax equal to 15 per centum thereof, * * *

* * * * *

(26 U. S. C. 1940 ed., Sec. 143.)

SEC. 211. [As amended by Sec. 4, Revenue Act of 1940, *supra*]. TAX ON NONRESIDENT ALIEN INDIVIDUALS.

(a) *No United States Business or Office.*—

(1) *General Rule.*—

(A) *Imposition of tax.*—There shall be levied, collected, and paid for each taxable year, in lieu of the tax imposed by sections 11 and 12, upon the amount received, by every nonresident alien individual not engaged in trade or business within the United States and not having an office or place of business therein, from sources within the United States as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, a tax of 15 per centum of such amount, * * *

* * * * *

(26 U. S. C. 1940 ed., Sec. 211.)

SEC. 212. GROSS INCOME.

(a) *General Rule.*—In the case of a nonresident alien individual gross income includes only the gross income from sources within the United States.

* * * * *

(26 U. S. C. 1940 ed., Sec. 212.)

Treasury Regulations 103, promulgated under the income tax provisions of the Internal Revenue Code:

SEC. 19.119–5. *Rentals and royalties.*—Gross income from sources within the United States includes rentals or royalties from property located within the United States or from any interest in such property, including rentals or royalties for the use of or the privilege of using in the United States, patents, copyrights, secret processes and formulas, good will, trade-marks, trade brands, franchises, and other like property. The income arising from the rental of property, whether tangible or intangible, located within the United States, or from the use of property, whether tangible or intangible, within the United States, is from sources within the United States.

SEC. 19.143–2. *Fixed or determinable annual or periodical income.*—Only fixed or determinable annual or periodical income is subject to withholding. The Internal Revenue Code specifically includes in such income, interest, dividends, rent, salaries, wages, premiums, annuities, compensations, remunerations and emoluments. But other kinds of income are included, as, for instance, royalties.

Income is fixed when it is to be paid in amounts definitely predetermined. Income is determinable whenever there is a basis of calculation by which the amount to be paid may be ascertained. The income need not be paid annually if it is paid periodically; that is to say, from time to time, whether or not at regular intervals. That the length of time during which the payments are to be made may be increased or diminished in ac-

cordance with someone's will or with the happening of an event does not make the payments any the less determinable or periodical. A salesman working by the month for a commission on sales which is paid or credited monthly receives determinable periodical income. The share of the income of an estate or trust from sources within the United States which is distributable, whether distributed or not, or which has been paid or credited during the taxable year to a nonresident alien beneficiary of such estate or trust constitutes fixed or determinable annual or periodical income within the meaning of section 143 (b). The income derived from the sale in the United States of property, whether real or personal, is not fixed or determinable annual or periodical income. Such items as taxes, interest on mortgages, or premiums on insurance paid to or for the account of a nonresident alien landlord by a tenant, pursuant to the terms of the lease, constitute fixed or determinable annual or periodical income.

SEC. 19.211–7. *Taxation of nonresident alien individuals.*—For the purposes of this section and sections 19.212–1, 19.213–1, 19.214–1, and 19.217–2, nonresident alien individuals are divided into three classes: (1) nonresident alien individuals not engaged in trade or business within the United States and not having an office or place of business therein at any time during the taxable year, and deriving in the taxable year not more than $21,600 gross amount of fixed or determinable annual or periodical income from sources within the United States; * * *

(*a*) *No United States business or office.—General rule.*—A nonresident alien individual within

class (1), referred to in the preceding paragraph, is liable to the tax upon the amount received from sources within the United States, determined under the provisions of section 119, which is fixed or determinable annual or periodical gains, profits, and income. For the purposes of section 211 (a), the term "amount received" means "gross income." Specific items of fixed or determinable annual or periodical income are enumerated in the Internal Revenue Code as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensation, remunerations, and emoluments, but other fixed or determinable annual or periodical gains, profits, and income are also subject to the tax, as, for instance, royalties. As to the determination of fixed or determinable annual or periodical income, see section 19.143–2. * * *

* * * * *

SEC. 19.212–1. *Gross income of nonresident alien individuals.*—* * *

* * * * *

(*a*) *No United States business or office.*—The gross income of a nonresident alien individual not engaged in trade or business within the United States and not having an office or place of business therein at any time during the taxable year, whether such alien comes within section 211 (a) or section 211 (c), is gross income from sources within the United States consisting of fixed or determinable annual or periodical income. His taxable income does not include profits derived from the effecting of transactions in the United States in stocks, securities, or commodities (including

hedging transactions) through a resident broker, commission agent, or custodian, or profits derived from the sale within the United States of personal property or real property located therein.

* * * * *

The report of the Senate Finance Committee on the 1936 Revenue Act stated as follows (S. Rep. No. 2156, 74th Cong., 2d Sess., pp. 21, 23 (1939-1 Cum. Bull. (Part 2) 678, 691-693)):

"Your committee concurs in the main in the substantial changes made by the House Bill in our present system of taxing nonresident aliens and foreign corporations. It seems obvious that a surtax on undistributed corporate profits is not well adapted to the taxation of a foreign corporation with foreign shareholders in respect of its income from sources within the United States. In section 211 (a) it is proposed that the tax on a nonresident alien not engaged in a trade or business in the United States and not having an office or place of business therein, shall be at the rate of 10 percent on his income from interest, dividends, rents, wages, and salaries and other fixed and determinable income, with no allowance for the deductions from gross income and credits against net income allowed to individuals subject to normal tax and surtax on net income. * * * This flat tax (in the usual case) is collected at the source by withholding as provided for in section 143. Such a nonresident alien will not be subject to the tax on capital gains, including so-called gains from hedging transactions, as at present, it having been found administratively impossible effectually to collect this latter tax. It is believed

this exemption from tax will result in considerable additional revenue from the transfer taxes and from the income tax in the case of persons carrying on the brokerage business. The principal increase in revenue will result, however, from withholding tax on dividends heretofore not required.

"In the case of a nonresident alien engaged in trade or business in the United States or having an office or place of business therein, the same tax is levied upon his net income from sources within the United States as is levied upon the American citizen or resident under the House bill.

* * * * *

"In the case of a foreign corporation not engaged in trade or business within the United States and not having an office or place of business therein, the House bill would levy a flat rate of tax of 15 percent on the gross income of such corporation from interest, dividends, rents, salaries, wages, and other fixed and determinable income from sources within the United States (not including capital gains), the tax being collected in the usual case by withholding at the source, with no deductions or credits allowed. Your committee concurs in the substance of these provisions but recommends an amendment to section 231 of the House changing the rate of tax on such income, * * *.

* * * * *

"Your committee believes that the proposed revision of our system of taxing nonresident aliens and foreign corporations will be productive of substantial amounts of additional revenue, since it replaces a theoretical system impractical of administration in a great number of cases."

In the

Supreme Court of the United States

October Term 1945

No. 1151

SAX and ROSE ELIZABETH ROHMER,

Petitioners,

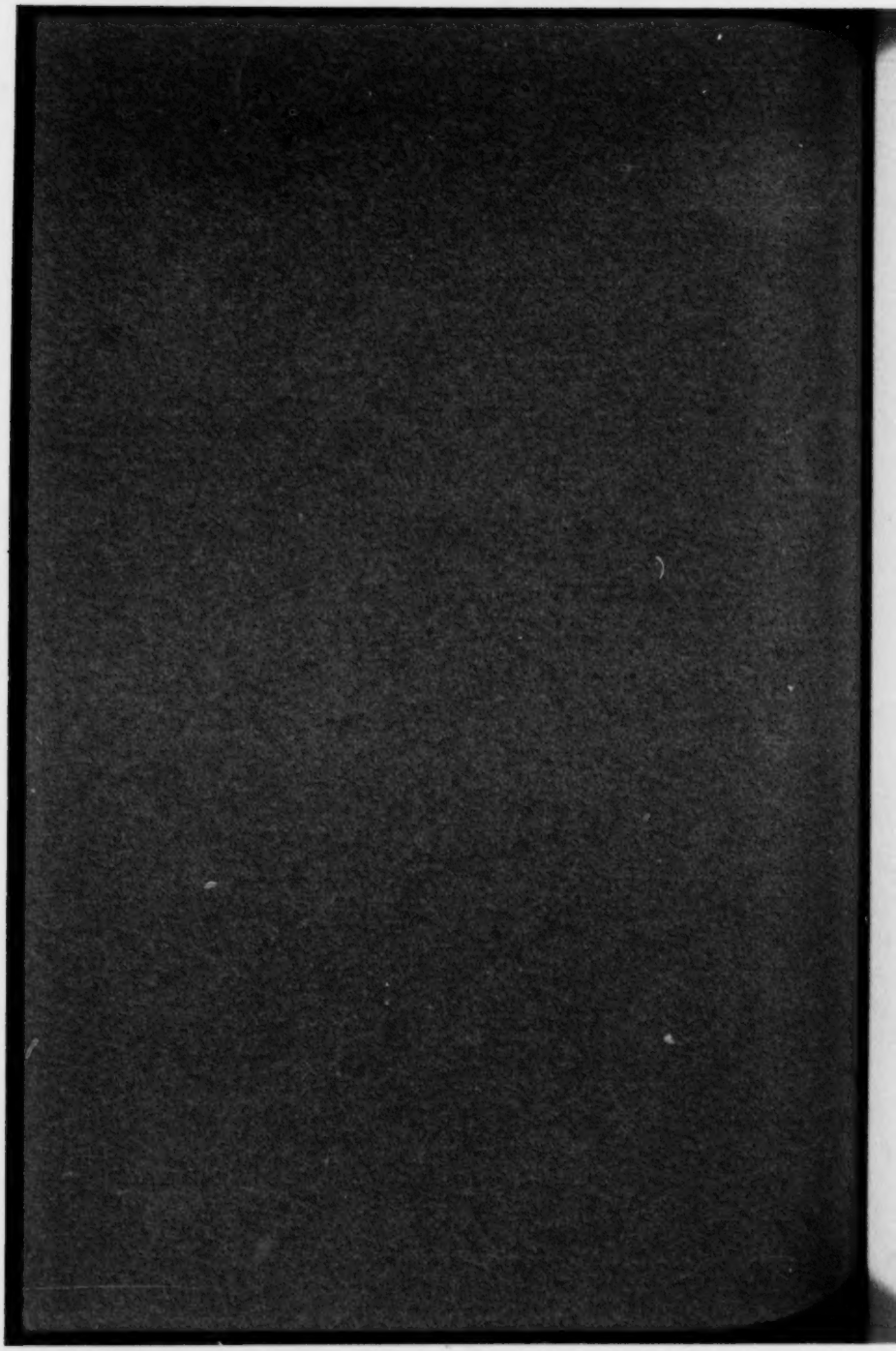
against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

MEMORANDUM OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI

May 10, 1946



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IN THE

Supreme Court of the United States

OCTOBER TERM 1945

SAX AND ROSE ELIZABETH ROHMER, *Petitioners,* *against* COMMISSIONER OF INTERNAL REVENUE *Respondent.*	No. 1151

MEMORANDUM OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI

This memorandum is filed because the effect of the decision of the Circuit Court of Appeals for the Second Circuit in this case is to eliminate from Sections 143(b) and 211(a) (1)(A) of the Internal Revenue Code the requirement that payments to non-resident aliens, not engaged in trade or business in the United States and not having an office or place of business therein, be "annual or periodical" income in order to be (a) taxable to them and (b) subject to withholding of tax thereon by withholding agents. The requirement that income paid to such non-resident aliens be "annual or periodical" in order to require either withholding or taxability continues to appear in both of the just cited sections of the statute and also in the applicable Treasury Regulations (i.e., Sections 19.143-2, 19.211-7 and 19.212-1-(a) of Treasury Regulations 103), which Regulations have acquired the added sanction of the repeated reenactment of the statute since they were first promul-

gated under the Revenue Act of 1936. See *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, 466; *Helvering* v. *Winmill*, 305 U. S. 79, 83; *Helvering* v. *Griffiths*, 318 U. S. 371, 395, 397.

The sole basis for the opinion of the Court below in this case that no further effect is to be given to the words "annual or periodical" contained in the statute *and in the Regulations*, is a paraphrase of Section 211(a) of the Revenue Act of 1936 which appears in the Committee Reports on the Revenue Bill of 1936 (e.g., Senate Report No. 2156, 74th Congress, 2d Session, page 21; 1939-1 C.B. (Part 2), 691). That paraphrase omits a number of categories of income mentioned in the statute and refers to "fixed and determinable" income rather than to the phrase "fixed or determinable annual or periodical" income used in the statute and the Regulations. The Committee Report upon which the Court below relies does not purport to eliminate the phrase "annual or periodical" which remains in both the statute and the Regulations. Neither does it attempt to interpret that phrase. It merely omits it in a paraphrase of the statute, an omission which surely has no legal effect, and which neither the Congress when it passed the statute, nor the Treasury when it adopted its interpretative Regulations, chose to follow.

Every withholding agent in the United States is affected by the decision of the Court below in this case. A withholding agent must, as an agent of the United States, make a decision, at his peril, as to what is the proper tax to be withheld. His position is peculiarly such that his duties should be defined with certainty. That applies not only to withholding agents residing within the Second Judicial Circuit, but also to those residing within the other nine Judi-

cial Circuits and the District of Columbia. All require an authoritative interpretation of the law by this Court with respect to the requirements of withholding in order that they may perform the duties imposed upon them by the Internal Revenue Code. Only an opinion of this Court can properly instruct withholding agents in a situation in which, to quote the candid statement of the Court below, "the Congressional purpose is not crystal-clear and * * * the legislative history does not put beyond all conceivable doubt the purpose to impose a tax on such transactions as that before us here".

There can be no doubt from a reading of the opinion of the Court below that it has, by judicial decision, eliminated the words "annual or periodical" which the Congress placed in the sections of the statute applicable both to withholding agents and to non-resident aliens. Moreover, even had the decision below been made in an attempt to give effect to the words "annual or periodical" by interpreting them to include the payment involved in the instant case, such an interpretation would have been so far outside the ordinary meaning of those words as to cause confusion which can be remedied only by a decision of this Court. Cf. *Woolford Realty Co.* v. *Rose,* 286 U. S. 319, 327; *Old Colony Railroad Co.* v. *Commissioner,* 284 U. S. 552, 560; *Lynch* v. *Alworth-Stephens Co.,* 267 U. S. 364, 370.

The instant payment was a lump sum payment in 1940 of $10,000 for the American and Canadian serial rights, without limitation of time, to a story. The payment was not conditioned upon any use of the story and it is stated in the findings of fact of the Tax Court that it does not appear whether the serial rights were ever used. (5 T.C. 183, 185) The $10,000 payment was accordingly a pay-

ment made without relation to any period of time and without relation to any period of use. It may be assumed for the purpose of argument that a lump sum advance payment of interest or rent might nevertheless be "annual or periodical" in nature because interest and rent are based upon annual or other periods of time and their amount is computed with respect to such periods of time. However, a lump sum payment which is made without respect to any period of use or any period of time (annual or otherwise) cannot be said to be "annual or periodical" within the ordinary meaning of that term.

It is respectfully urged that this Court grant the petition for certiorari.

Respectfully submitted,

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New York 5, N. Y.

May 10, 1946.

FILED
MAY 1 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 1151.

SAX and ROSE ELIZABETH ROHMER,
Petitioners,

—against—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

MEMORANDUM AS AMICI CURIAE ON PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Attorney for Warner Bros. Pictures, Inc.

JOSEPH D. KARP,
Of Counsel.

THE COURT PRESS, N. Y. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 1151.

SAX and ROSE ELIZABETH ROHMER,
Petitioners,

—against—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

MEMORANDUM AS AMICI CURIAE ON PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioners and the respondent on the application for certiorari have consented to the filing of this memorandum.

Loew's Incorporated and Warner Bros. Pictures, Inc., herein called the Intervenors, frequently produce motion pictures based on the works of alien authors, in the course of which they acquire from alien owners or authors (ordinarily not doing business here) exclusive world motion picture rights, outright and forever, for which payment is made in a lump sum in full consideration for the rights acquired.

Because of the apparently plain and unambiguous language of the Revenue Act and Treasury Department regulations, Intervenors paid many such alien owners their full consideration, without withholding income tax therefrom, for there was no authority found

in the statutes, the regulations, or court decisions, to authorize or require any withholding. Now under the interpretation of the Revenue Act in the instant case, your Intervenors may be found personally accountable for such aliens' taxes, although they will be unable in many cases to obtain the return of any part of the payments previously made to these authors. In any event the decision of the Court below leaves matters of importance in great doubt and confusion. Intervenors therefore urge that a review and decision by this Court is necessary and desirable.

The pertinent facts, and the statutes and regulations involved, appear in the petition and brief of Petitioners Sax and Rose Elizabeth Rohmer.

Argument.

This Court has uniformly ruled that the revenue statutes should be interpreted in accordance with the plain and ordinary meaning of the language employed, unless there is explicit proof of Congressional intention to the contrary. *Old Colony Railroad Co.* v. *Commissioner of Internal Revenue,* 284 U. S. 552, 76 L. Ed. 484; *Deputy* v. *duPont,* 308 U. S. 488, 84 L. Ed. 416. Intervenors here find no such proof to the contrary.

No statutory wording, prior Circuit Court decisions, or regulations promulgated by the Commissioner of Internal Revenue, gave the Intervenors at any time in question, any apparent grounds or right to withhold tax from the consideration contracted for, where the transaction was a purchase, without limit of time or reversion, of all motion picture rights in a particular work. It is submitted that such transactions, particularly when paid for in lump sum,

are not subject to withholding (and are not taxable to a non-resident alien after the 1936 revision) unless the words and language of the statute and the regulations are given a strange and unusual meaning. It is felt that such an interpretation has now been given them by the Circuit Court opinion.

Prior to 1936, non-resident aliens (not doing business here) were taxed on all income from United States sources, but not all such income was subject to withholding. In 1936, it was apparently recognized that there had been a substantial loss *in collection* of such taxes. As a result the 1936 Act changed the plan of alien taxation, by making aliens taxable only as to income subject to withholding at the source, and added "dividends" to the classes of income from which tax must be withheld. (Dividends are not involved in the instant case.)

Since 1936, it seems agreed that whatever income is taxable as to a non-resident alien not here doing business, is also subject to withholding, and vice versa.

The Treasury regulations have always held, that only "fixed or determinable *annual or periodical** income" was subject to withholding, and the words quoted above are the exact words found in the Act as it stood both before and after 1936. (And since 1936, the same quoted wording is found in the section taxing the income of non-resident aliens not doing business here.)

In *Sabatini* v. *Commissioner* (C. C. A. 2d), 98 Fed. (2d) 753 (involving a tax year prior to 1936), the question was whether acquiring a right to use motion picture rights for a limited period was, (a) a sale, or (b) a license whose consideration would *prima facie*

* Italics throughout are ours.

be prepaid royalty. The Court in holding it was not a sale, pointed to facts showing that what was there transferred, was only a right of use for a limited ten year period. There was also in evidence in that case, the fact that after that limited period, there were options to continue the right of use from year to year by annual payments. Your Intervenors assumed, and we believe logically, that a contrary result would have been indicated in the *Sabatini* case (which as Petitioners point out could have no application as against them for the reason that it construed the statute as it existed prior to the 1936 revision) had the transaction been an outright purchase forever without reversion. Your Intervenors believe that the foregoing contrasting attributes, are always the crucial test of a sale in common parlance, as well as legal.

Later the same Circuit Court, in *Goldsmith* v. *Commissioner,* 143 Fed. (2d) 466 (cert. denied, 323 U. S. 774), expressed the view in its majority opinion, that a conveyance of the exclusive motion picture rights in a play, without limitation of time or any reversion, was a sale.

It is submitted that a sale, legally and by common usage, clearly means to a taxpayer or purchaser, a transaction where one buys outright from another without reversion or limit of time. In contrast, a use or occupation for a limited period followed by complete termination and reversion, is not a sale.

Your Intervenors contend that the opinion in this case, does not follow the well established rule that the usual meaning be given to words and phrases. Certainly including dividends in the withholding section and making taxable only income subject to withholding, could not indicate a Congressional intent to

apply any new or strange definition of a sale. Intervenors also contend that the Court further erred in holding that the 1936 revision was intended to eliminate the words "annual or periodical" in *interpreting* the section, where these very words were in the section before 1936 and were retained and re-enacted in that section in the 1936 revision, as well as in all subsequent revenue acts.

Reverting to the opinion of the Circuit Court, the Intervenors call particular attention to the Court's comment upon the *Sabatini* case. Said the Court: "True, there the transfer was but for a limited time while here the time is unlimited; that, we think, *is a distinction without a difference,* since here, as in *Sabatini,* the transfer was but of a limited part of the author's bundle of rights, * * *." But there is a difference. A use for a limited period followed by complete termination and reversion, is basically the exact opposite of a purchase of ownership forever with no reversion. It is a difference, and a most important one, for this is the customary test of what is a sale. The difference is what distinguishes a sale from that which is not a sale. And here it should be borne in mind, that motion picture rights are a complete and well established class of rights which constitute personal property, and they are the specific rights usually needed and acquired by the motion picture industry.

The opinion further seems to consider that the intent of the Act was to determine whether a transaction was a sale, by comparing the amount of personal property acquired by the purchaser, as compared with that retained by the seller. We submit that this is not the test. The test rather is whether

there is any reversion to the seller in what the purchaser bought. The Court decided erroneously that where an author in writing a work acquired a "bundle" of rights that were personal property, unless he sold them all (or perhaps substantially all) to one buyer in one sale, there was no sale. In support of our contention we call attention to the ruling of the same Court which held in *General Aniline and Film Corporation* v. *Commissioner,* 139 Fed. (2d) 759, that although some of the original patent rights of the author were not included in the sale, the transaction, nevertheless, was still a sale of a patent. In its present opinion the Court explains that holding, by indicating that it would only be a sale, if the remainder was "relatively insubstantial." It is our contention that any test based on the *quantity* of personal property conveyed, has no support in the Act or in the report of any Committee, and is a new and unusual definition or test of a sale, and that such a test is unscientific and much too uncertain for practical operation, and would lead to confusion.

Why should a motion picture company, which acquires forever all the literary and dramatic personal property rights which it customarily uses and which is all that it needs in its established trade (*i. e.*, all motion picture rights and rights incidental thereto in the author's work) be less a purchaser of such personal property, than one who buys all the property rights the author may have in his work, including stage rights, publishing rights, etc.? It has no need for any other rights possessed by the seller and has no interest in them. They would not aid even slightly in the production of a motion picture. The copyright act protects and mentions specifically motion pictures, and any such class of rights under copyright may be transferred

independently of other or remaining rights or property.

Intervenors contend that the Court erred in deleting the words "annual and periodical" in construing these sections. It seems that any plain and natural interpretation of the sections, restricts its application to income of this nature. In reaching its decision, the Court below excised the very pertinent words "annual or periodical" and the only apparent reason given for doing so, seems to be that in the 1936 revision, the Committee Report stated its purpose was to tax "gross income from interest, dividends, rent, wages and salaries and other fixed and determinable income." Because the Committee did not go on and also quote the words that followed in the section (*i. e.*, "annual or periodical") the Court held these words should be omitted in construing the section. But it is obvious that the Committee did not attempt to quote all the wording of the section.

The Court seems to have considered this obvious summary of the general purpose of the section as plain proof of Congressional intent to omit from *its construction,* the words (*"annual and periodical"*) which were reenacted in 1936 in the section.

We submit that it is elementary that a Committee Report briefly referring to a purpose cannot be held to override a statute or be considered authority for reading out of the section all that is contained therein merely because the Committee did not care to mention the omitted portion in its Report. On the Court's theory, if a Committee Report quoted only half of a section, the remaining part actually in the section but not quoted would be presumed to have no purpose, and be of no force or effect. We are reminded that,

"Excision is a 'desperate remedy'." (Cardozo, *J.*, in *Matter of Buechner,* 226 N. Y. 440, 443.)

The Court also seems to have felt that the deleted words must also be omitted in construction because the Committee stated its belief that the new 1936 system of taxing and withholding would be "productive of substantial amounts of additional revenue, since it replaces a theoretical system in practical administration in a great number of cases." Surely such a purpose should not be construed to mean that a section reenacted word for word (with only "dividends" added) would thereafter, (a) make taxable and subject to withholding new or different classes of income (other than dividends), or (b) create a new definition of what is a sale which is based on the *quantity* of property sold, or (c) eliminate in construction three most important words which were always found in the section and again reenacted into it. These three words are in our opinion determinative whether or not the payment is taxable, and we relied upon these three words in our dealings with foreign authors. We submit that what was principally in the mind of the Committee, was that in 1936 dividends were obviously a very large source of revenue to aliens, and that by then making dividends also subject to collection of tax at source, increased revenue was to be expected, and that this change gave rise to the quoted statement found in the Committee Report.

The enactment of the Revenue Act of 1936, changed the law with respect to non-resident aliens to make taxability and withholding coterminous. The Commissioner's regulations in respect to withholding have therefore become especially important in determining

the taxability of a non-resident alien not doing business here. Art. 211-7 (a) of Reg. 94 promulgated under the income tax provisions of the Revenue Act of 1936, expressly directs taxpayers to Art. 143-2 of the same regulations "as to the determination of fixed or determinable annual or periodical income." Subsequent regulations contain the same directions. Art. 143-2, insofar as it applies to the instant case, is identical with the language contained in the regulations in force both before and after the 1936 amendment. A cursory as well as a close reading of this article makes it "crystal clear" that Petitioner was not taxable in this case. This Court is respectfully referred to the following words appearing therein:

> "Only fixed or determinable annual or periodical income is subject to withholding. * * *
>
> "Income is *fixed* when it is to be paid in amounts definitely predetermined. Income is *determinable* whenever there is a basis of calculation by which the amount to be paid may be ascertained. The income *need not be paid annually if it is paid periodically*; that is to say, *from time to time,* whether or not at regular intervals. * * * The income derived from the *sale* in the United States of *property*, whether real or personal, *is not* fixed or determinable annual or periodical income.* * *" (Italics supplied.)

The Commissioner in allowing the foregoing words of his regulation to remain unchanged after the 1936 amendments thereby showed that he, too, saw no Congressional intent to delete the words "annual or periodical" from the statute, and his presentation of this argument to the Court below was *in extremis* in a hopeless situation. Nevertheless, it worked. It is

apparent that in accepting this argument the Court below did not "give great weight to an administrative interpretation long and consistently followed, particularly when the Congress, presumably with that construction in mind, has re-enacted the statute without change." *Koshland* v. *Helvering,* 298 U. S. 441; *National Lead Co.* v. *United States,* 252 U. S. 140.

Your Intervenors, therefore, request this Court to grant certiorari, on the grounds that the transaction in the instant case had all the attributes of a sale and was a sale under all previously established definitions of that term, and for the additional reason that the income in question was not income of an "annual or periodical" nature.

Respectfully submitted,

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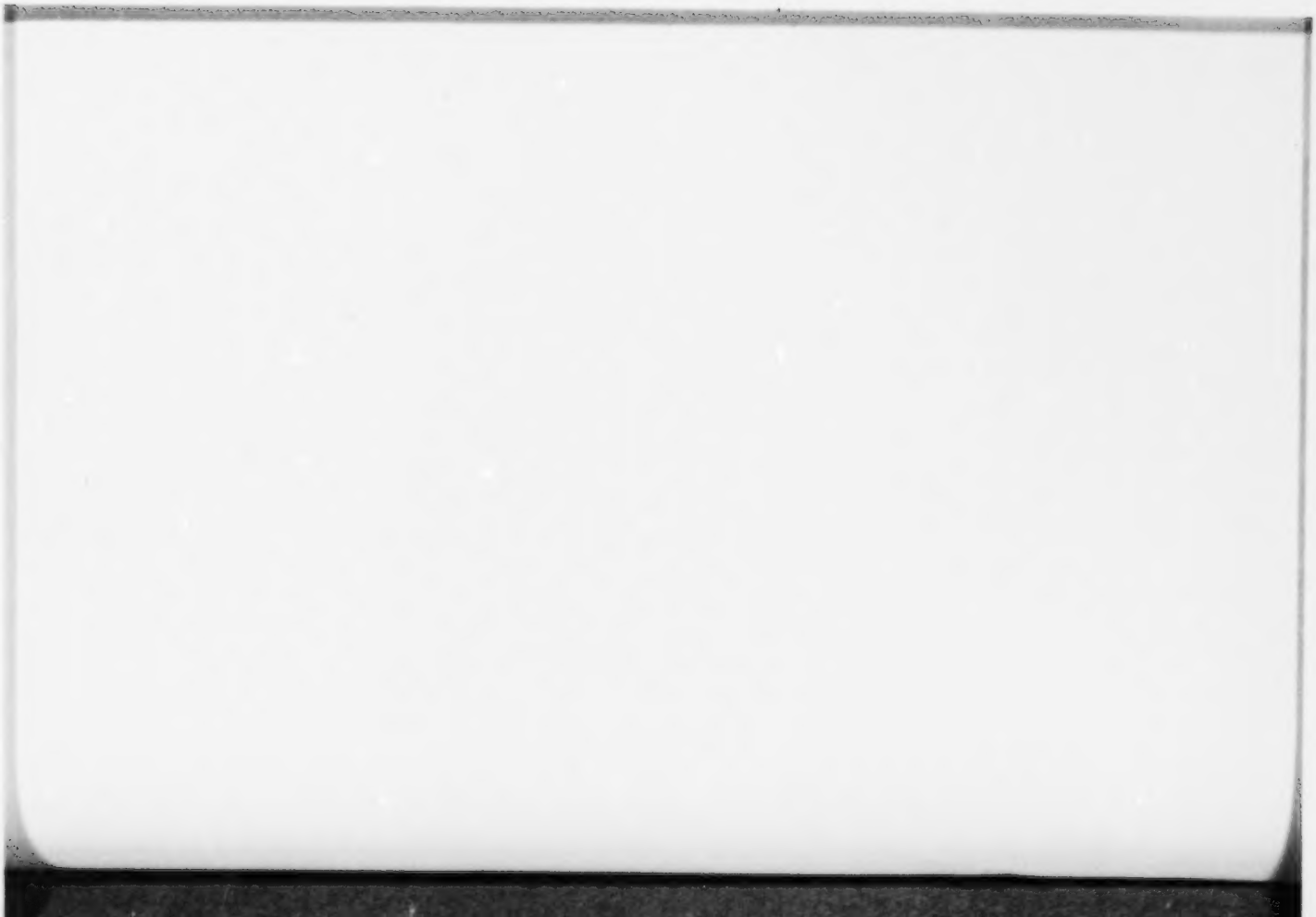
Joseph D. Karp,
Of Counsel.



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No. 1451

In the Supreme Court of the United States

OCTOBER TERM, 1945

SAX AND ROSE ELIZABETH BOEHME, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1151

SAX AND ROSE ELIZABETH ROHMER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 11–22) are reported at 5 T. C. 183. The opinion of the Circuit Court of Appeals (R. 31–39) is reported at 153 F. (2d) 61.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 3, 1946. (R. 40.) Petition for rehearing was denied January 25, 1946. (R. 55.) The petition for a writ of certiorari was filed April 24, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the

Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the $10,000 paid in two lump sums for the use of taxpayer's story "The Island of Fu Manchu" for magazine and newspaper publication in serial form in the United States and Canada is "fixed or determinable annual or periodical gains, profits, or income" within the meaning of Section 211 (a) (1) (A) of the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and Treasury Regulations are set forth in the Appendix, *infra*, pp. 18–23.

STATEMENT

The facts found by the Tax Court (R. 12–15) are as follows:

The taxpayers, husband and wife, are British subjects and reside in Little Gatton, Reigate Hill, Surrey, England. During the taxable year they were nonresident aliens not engaged in a trade or business in the United States and had no office or place of business in the United States. On June 14, 1941, they filed a joint nonresident alien income and defense tax return for the calendar year 1940 with the Collector of Internal Revenue at Baltimore, Maryland. Sax Rohmer will hereinafter be referred to as the taxpayer. (R. 12.)

Paul R. Reynolds & Son is a literary agent, engaged in business in the United States, and during the year 1940 was the exclusive literary agent of taxpayer in this country. In 1940 the agent received a story entitled 'The Island of Fu Manchu'' from taxpayer, and secured an offer from McFadden Publications, Inc., for the use of the first and second American and Canadian serial rights. The total consideration paid for the serial rights was $10,000 and was represented by two checks, one in the amount of $1,000 and the other in the amount of $9,000. These amounts, respectively, were paid to Paul R. Reynolds & Son, as agent, on July 10, 1940, and August 21, 1940. The only written contract between McFadden Publications, Inc., and taxpayer or his literary agent, covering the manuscript in question, is that contained above the endorsement of the two checks received in payment for the manuscript. (R. 12–13.) The rights to the manuscript granted to McFadden Publications, Inc., which are contained in the above endorsement to the checks, consist of the following (R. 13):

> The payee represents he is agent of the Author named below, and, as agent, acknowledges full payment for manuscript(s) entitled
>
> THE ISLAND OF FU MANCHU
>
> By Sax Rohmer
>
> With authority to copyright and with privilege of change of title; and warrants

and represents that such composition is original and if not fiction, also factually true, and that the author above is the sole owner thereof. Any alteration hereof makes this check void.

(a) With 1st and 2nd American & Canadian serial rights and right to export copies and republish in foreign editions of publication. No prior publication anywhere in the world except by special written agreement. No book publication before magazine publication is completed.

INCLUDING THE RIGHT TO ADVERTISE, DESCRIBE OR DRAMATIZE THE SAID STORY AND/OR TO PRESENT THE SAME IN DRAMATIC OR OTHER FORM AS PART OF LIBERTY RADIO BROADCAST.

By the first and second serial rights is meant the right to magazine and newspaper publication of the story in serial form. The story was licensed to McFadden Publications, Inc., for publication in Liberty Magazine in the United States and Canada. The record does not show whether the story was ever in fact published in serial form by Liberty Magazine in the United States or Canada. The average Canadian circulation of Liberty Magazine for a period of one year succeeding July 1, 1940, was approximately seven percent of the combined circulation in the United States and Canada. (R. 14.)

The rights to the story subsequently published in book form, produced as a motion picture, or as a stage production, were retained by taxpayer.

The book publishing rights were subsequently licensed to Doubleday Doran & Company, Inc., under a royalty agreement. (R. 14.)

The arrangement of Paul E. Reynolds & Son with taxpayer was that it should act as taxpayer's exclusive agent for the sale in the United States and Canada of his literary works. It was understood that the agent would be entitled to 10 percent of the gross amount received from McFadden Publications, Inc., as a commission for services. This commission was the customary amount paid to literary agents. It was the practice of the agent to deposit the entire proceeds in its own bank account and thereafter, from time to time, to remit 90 percent of the proceeds to taxpayer. (R. 14.)

Income tax on the $10,000 received from McFadden Publications, Inc., was paid at source through withholding and the $10,000 was reported as income in 1940 by taxpayer and his wife, except that they deducted from gross income the commissions paid the literary agent during the year 1940 and also deducted 7 percent of the $10,000 as income allegedly received from sources outside the United States. (R. 14–15; see also, R. 7.) The Commissioner denied these deductions and determined a deficiency of $77.61. (R. 14–15.) On petition for review by the Tax Court, taxpayer and his wife claimed they were entitled to a refund of $1,797.50 on the ground that none of the

$10,000 received from McFadden Publications, Inc., was taxable. (R. 12.)

The Tax Court held that the $10,000 constituted a lump sum royalty and was taxable under Section 211 (a) (1) (A) of the Internal Revenue Code to the extent that it was derived from sources within the United States; that there was no basis in the record for a determination that any part of the $10,000 was derived from sources outside the United States; and that taxpayer is not entitled to a deduction for the ten percent commission he paid his United States agent. (R. 15–22.) On appeal, the Circuit Court of Appeals affirmed this decision *in toto*. (R. 31–39.) The taxpayer now claims only that the $10,000 is not taxable under Section 211 (a) (1) (A) of the Internal Revenue Code and has apparently abandoned his other contentions. (Pet. 2–3.)

ARGUMENT

Taxpayer contends that the $10,000 McFadden Publications, Inc., paid for the American and Canadian serial rights to the story "The Island of Fu Manchu" is not taxable to him under Section 211 (a) (1) (A) of the Internal Revenue Code (Appendix, *infra*) as "other fixed or determinable annual or periodical gains, profits, and income" because the $10,000 was paid in two lump sums rather than annually or periodically (Br. 5–16.) The *amici curiae* briefs filed in this case make a similar argument. The merits of the case hinge

on an interpretation of the language of Section 211 (a) (1) (A). Contrary to taxpayer's assertions that the decision below threatens "inextricable confusion" (Br. 5, 13) and involves an important question which should be settled by this Court (Pet. 2–3; Br. 17; see also brief of Roswell Magill and George G. Tyler, *amici curiae*), the interpretation placed on the statutory language by the court below is supported, we submit, by the full context of the statute, its legislative history, administrative practice, and prior decisions.

For the most part, taxpayer's argument is directed toward a point over which there is no dispute. He argues that by Section 211 (a) (1) (A) Congress intended to tax only income which had previously been subject to withholding under the substantially identical provision which has been contained in the various revenue acts since 1918 and is now Section 143 (b) of the Internal Revenue Code (Appendix, *infra*). (Br. 6, 9, 11, 16.) The court below did not hold to the contrary; it specifically stated that the coverage of Section 211 (a) (1) (A) as to taxability is "the same as that of the withholding provision." (R. 33.)

Taxpayer's assertion that the decision below deletes the words "annual or periodical" from Section 211 (a) (1) (A) (Br. 10, 13, 14–15; see also *amici curiae* briefs) misconstrues the basis of the decision below. Section 211 (a) (1) (A) taxes

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"dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income" derived from sources within the United States. The statute does not state that only such gains, profits, and income as are actually paid periodically are taxable. Hence, deletion does not necessarily follow from the failure to give the statute such an interpretation. The pertinent inquiry is whether the Circuit Court of Appeals was correct in its conclusion that the phrase "other fixed or determinable annual or periodical gains, profits, and income" is "descriptive of the nature or type of income, regardless of the actual manner of payment."[1] (R. 34.) The Tax Court had placed the same interpretation on the statute. (See R. 18.)

The context of Section 211 (a) (1) (A) is in accord with that interpretation, with consequent taxability in the instant case. The statute expressly names certain types of income which are

[1] Even if the statute were deemed to cover only income of a recurring nature, it would seem that taxpayer would nevertheless be taxable on this $10,000. The Tax Court found that Paul R. Reynolds & Son was the exclusive literary agent in this country in 1940 for taxpayer's literary works and that it was the agent's practice to remit 90 percent of the proceeds to taxpayer from time to time. (R. 14.) While the record does not reveal how many stories taxpayer's agent handled for him, the arrangement was obviously one where taxpayer received income periodically through his United States agent.

taxable, such as rents and compensations, and then adds the phrase "or other fixed or determinable annual or periodical gains, profits, and income." Since rents and compensations are explicitly covered, it can hardly be assumed that they are not taxable if paid in a lump sum. The phrase "or other fixed or determinable annual or periodical gains, profits, and income" simply means that other gains, profits, and income of the same type as those expressly named are also taxable. And, since the enumerated types consist of income which is *usually* paid periodically, it must follow that that is the type of income Congress intended to include, regardless of the manner of actual payment in a particular case. Royalties are of that type and the $10,000 paid by McFadden Publications, Inc., for the American and Canadian serial rights to "The Island of Fu Manchu"—a limited use, since taxpayer retained motion picture, book publishing, and stage production rights—was a royalty. Like rent and compensation for services, royalties are paid for the use of an article, *usually* at a set or determinable amount periodically. 3 Bouvier's Law Dictionary (Rawle's Third Revision) 2975; Webster's International Dictionary; *Tesra Co.* v. *Holland Furnace Co.*, 73 F. (2d) 553, 554 (C. C. A. 6th); *Western Union Tel. Co.* v. *American Bell Tel. Co.*, 125 Fed. 342, 348–349 (C. C. A. 1st). A lump sum payment may also be a royalty if it is paid by a

licensee to a licensor for the use of an article. *Sabatini* v. *Commissioner*, 98 F. (2d) 753 (C. C. A. 2d); *Hazeltine Corp* v. *Zenith Radio Corp.*, 100 F. (2d) 10, 16–17 (C. C. A. 7th); *Ehrlich* v. *Higgins*, 52 F. Supp. 805 (S. D. N. Y.); *Marton* v. *Commissioner*, 47 B. T. A. 184; cf. *Berlin* v. *Commissioner*, 42 B. T. A. 668; *Kaltenbach* v. *United States*, 66 C. Cls. 581; *Browning Co.* v. *Commissioner*, 6 B. T. A. 914. As in the case of rent and compensation, the purpose for which the payment is made and not the manner of payment is the determining factor. *Commissioner* v. *Affiliated Enterprises*, 123 F. (2d) 665, 668 (C. C. A. 10th).

The legislative history of Section 211 (a) (1) (A) indicates that Congress interpreted the statute as simply defining the nature or type of income subject to tax, irrespective of the manner of actual payment; assumed that lump sum royalties were covered by the withholding provision, now Section 143 (b) of the Internal Revenue Code; and intended royalties to be covered by Section 211 (a) (1) (A), through which withholding and taxability were made coterminous in 1936 as to nonresident aliens not engaged in a trade or business in the United States and not having an office or place of business here. Until 1936 nonresident aliens were taxable on all income from sources within the United States and from 1921 on the various Revenue Acts specifically defined income from sources within the United States as including interest,

dividends (with exceptions), compensation for personal services, gain from the sale of real and personal property under certain circumstances, and rentals and royalties from any interest in property located in the United States, "including rentals or royalties for the use of or for the privilege of using in the United States, patents, copyrights, secret processes and formulas, good will, trade-marks, trade brands, franchises, and other like property."[2] From 1918 to 1936 the Revenue Acts successively contained a provision, substantially identical to the present Section 143 (b), for withholding of the tax on all "rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income" of a nonresident alien.[3] In interpreting this withholding section, Treasury Regulations from 1924 to 1936, like Article 19.143–2 of Treasury Regulations 103, promulgated under the Internal Revenue Code (Appendix, *infra*), provided that "fixed or determinable annual or periodical income" included royalties but not income derived

[2] Section 217 of the Revenue Acts of 1912, c. 136, 42 Stat. 227; 1924, c. 234, 43 Stat. 253; and 1926, c. 27, 44 Stat. 9; Section 119 of the Revenue Acts of 1928, c. 852, 45 Stat. 791; 1934, c. 277, 48 Stat. 680; 1936, c. 690, 49 Stat. 1648; and 1938, c. 289, 52 Stat 447; Section 119 of the Internal Revenue Code.

[3] Section 221 (a) of the Revenue Acts of 1918, c. 18, 40 Stat. 1057; 1921, 1924, and 1926; Section 144 (b) of the Revenue Act of 1928; Section 143 (b) of the Revenue Acts of 1932, c. 209, 47 Stat. 169, and 1934.

from the sale of real or personal property.[4] In 1933, in interpreting the taxing section, the Treasury Department held that a lump sum payment for the first and second American and Canadian serial rights of an author's output of stories was a royalty and not a sale of property. See I. T. 2735, XII–2 Cum. Bull 131–135 (1933). In 1936, when Congress changed the law to make taxability

[4] Article 362 of Treasury Regulations 45, promulgated under the Revenue Act of 1918, and of Treasury Regulations 69, promulgated under the Revenue Act of 1926; Article 762 of Treasury Regulations 74, promulgated under the Revenue Act of 1928, and of Treasury Regulations 77, promulgated under the Revenue Act of 1932; Article 143–2 of Treasury Regulations 86, promulgated under the Revenue Act of 1934; Articles 143–2 and 211–7 (a) of Treasury Regulations 94, promulgated under the Revenue Act of 1936, and of Treasury Regulations 101, promulgated under the Revenue Act of 1938.

While in one respect these Regulations seemed to contemplate periodic payment, they provided (*ibid.*):

"That the length of time during which the payments are to be made may be increased or diminished in accordance with someone's will or with the happening of an event does not make the payments any the less determinable or periodical."

That the manner of payment was deemed of no importance is evidenced by the fact that since 1936, when dividends were added to the statute, the Treasury Regulations have provided that the statute includes all distributable trust income from sources within the United States, *whether distributed or not.* Article 143–2 of Treasury Regulations 94, promulgated under the Revenue Act of 1936, and of Treasury Regulations 101, promulgated under the Revenue Act of 1938; Treasury Regulations 103, promulgated under the Internal Revenue Code, Sec. 19.143–2.

and withholding coterminous, the Senate and House Reports on Section 211 reflected that Congress intended to relieve nonresident aliens of the tax only on capital gains, including so-called gains from hedging transactions, because it had been found impossible to collect effectually, and believed that this exemption would result in additional revenue from transfer taxes, from the income tax in the case of persons carrying on the brokerage business, and by the inclusion of dividends previously exempted. S. Rep. No. 2156, 74th Cong., 2d Sess., pp. 21, 23 (1939–1 Cum. Bull. (Part 2) 678), set forth in part at pages 25–26 of taxpayer's brief; H. Rep. No. 2475, 74th Cong., 2d Sess., pp. 9–10 (1939–1 Cum. Bull. (Part 2) 667). It seems reasonably apparent, therefore, as the court below concluded (R. 33), that Congress intended nonresident aliens to remain taxable on all royalties as defined in Section 119 (a) (4) of the Internal Revenue Code (Appendix, *infra*).

It further appears that Congress has attached little, if any, importance to the words "annual or periodical" contained in these statutes. In the House and Senate Reports on the 1936 change, just mentioned, the statutory language was referred to as covering "fixed or determinable income." (See R. 35.) This "abbreviation of the full statutory language," as taxpayer terms it (Br. 10), is consistent with the full context of the statute, as we have already shown, and re-

flects the Congressional interpretation of the statutory language. That interpretation is one which was reflected by Congress as far back as 1917 with respect to a provision which taxpayer erroneously assumes (Br. 10–11) is to be interpreted differently from Section 211 (a) (1) (A) and the withholding provision. Prior to 1917 there was a withholding provision applicable to citizens and nonresidents alike. See Section II D of the Income Tax Act of 1913, c. 16, 38 Stat. 114; Section 8 (d) of the Revenue Act of 1916, c. 463, 39 Stat. 756. Section 1211 of the War Revenue Act of October 3, 1917, c. 63, 40 Stat. 300, provided for information at source in lieu of withholding at source as to citizens on "interest, rent, salaries, wages, premiums, annuities, compensation, remuneration, emoluments, or other fixed or determinable gains, profits, and income." See H. Conference Rep. No. 172, 65th Cong., 1st Sess., pp. 52–53 (1939–1 Cum. Bull. (Part 2) 70). At the same time, by Section 1205 the withholding provision was retained as to nonresident aliens and covered the same enumerated types of income and "other fixed or determinable *annual or periodical* gains, profits, and income" [italics supplied]. Despite the omission of the words "annual or periodical" from the information at source provision, the House Report on the 1918 Revenue Act, which also omitted the words "annual or periodical" from the information at source provision (Section 256), stated that the 1917 Rev-

enue Act substituted information at source for collection at source "of any fixed or determinable *annual or periodical* sum" [italics supplied] in excess of $800. H. Rep. No. 767, 65th Cong., 2d Sess., p. 35 (1939–1 Cum. Bull. (Part 2) 86). Thus, instead of attaching importance to the omission of the words "annual or periodical," Congress assumed that the same income was covered with or without the addition of those words. The words "annual or periodical" may perhaps have been used merely to make it more plain that income from sales, which usually involve problems of basis, was excluded. It would seem clear enough, in any event, that the legislative history of Section 211 (a) (1) (A), and particularly the Congressional intent in 1936, to relieve nonresident aliens such as taxpayer only of the tax on capital gains, is sufficient to preclude the conclusion that lump sum royalties should be treated as sales rather than as royalties.[5]

The pertinent case history is in accord with the legislative intent. In *Sabatini* v. *Commissioner,*

[5] It seems of little significance that, as taxpayer states (Br. 13–14), at the time Section 211 (a) (1) (A) was passed the Circuit Court of Appeals for the Second Circuit had not yet reversed that part of *Sabatini* v. *Commissioner*, 32 B. T. A. 705, in which the Board of Tax Appeals, *sub silentio*, disapproved of I. T. 2735, *supra*, a 1933 administrative ruling that lump sum payments for serial and motion picture rights are taxable as royalties and not sales. Similarly, the other administrative rulings cited by taxpayer (Br. 15–16), all of which were prior to I. T. 2735 except one, add nothing worthy of discussion.

98 F. (2d) 753 (C. C. A. 2d), it was held that a lump sum royalty was taxable as a royalty, not as a sale, under Section 119 (a) of the Revenue Act of 1928, which is substantially identical to the present Section 119 (a) of the Internal Revenue Code. *Commissioner* v. *Raphael,* 133 F. (2d) 442 (C. C. A. 9th), certiorari denied, 320 U. S. 735, held that a lump sum for interest included in a judgment for the fraudulent sale of land was taxable under Section 211 (a) (1) (A). In that case the court specifically rejected the taxpayer's contention that the statute applied only to income paid periodically. And see *De Nobili Cigar Co.* v. *Commissioner,* 143 F. (2d) 436 (C. C. A. 2d). The cases relied upon by taxpayer (Br. 6–7) are not in conflict with either these decisions or the decision below. *Commissioner* v. *Celanese Corp.,* 140 F. (2d) 339 (App. D. C.), and *General Aniline & Film Corp.* v. *Commissioner,* 139 F. (2d) 759, decided by the court below and explained in its opinion in this case (R. 37), each involved a sale and not a royalty use. *Goldsmith* v. *Commissioner,* 143 F. (2d) 466, certiorari denied, 323 U. S. 774, also decided by the court below, involved a different statute and has no important bearing on this case. (See opinion below, R. 38.)

There is no occasion for review of this case by the Court on the basis of taxpayer's assertion that uncertainty and possible conflict are created by the "warning," which taxpayer concedes "may

be only a solemn dictum" (Br. 17), in footnote 15 of the opinion below that the opinion of the court below in the *General Aniline* case "should not be deemed an unshakable precedent" in respect of the taxability of purchase price payments contingent on future profits (R. 37, fn. 15). Aside from the fact that the court's statement does not even constitute a holding one way or the other, the point is not involved in the instant case.

In conclusion, it should be noted that the tax on the $10,000 involved here was paid through withholding at source, apparently by taxpayer's literary agent. (See Statement, *supra,* p. 5.) This fact is inconsistent with, and indicates the lack of merit in, taxpayer's assertions that the decision below introduces confusion in respect of the coverage of Section 211 (a) (1) (A).

CONCLUSION

The decision below is correct and involves no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1946.

APPENDIX

Internal Revenue Code:

SEC. 119. INCOME FROM SOURCES WITHIN UNITED STATES.—(a) *Gross income from sources in United States.*—The following items of gross income shall be treated as income from sources within the United States:

* * * * *

(4) *Rentals and royalties.*—Rentals or royalties from property located in the United States or from any interest in such property, including rentals or royalties for the use of or for the privilege of using in the United States, patents, copyrights, secret processes and formulas, good will, trade-marks, trade brands, franchises, and other like property; and

(5) *Sale of real property.*—Gains, profits, and income from the sale of real property located in the United States.

(6) *Sale of personal property.*—For gains, profits, and income from the sale of personal property, see subsection (e).

* * * * *

(26 U. S. C. 1940 ed., Sec. 119.)

SEC. 143 [As amended by Sec. 5 of the Revenue Act of 1940, c. 419, 54 Stat. 516]. WITHHOLDING OF TAX AT SOURCE.

* * * * *

(b) *Nonresident aliens.*—All persons, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, employers, and all officers and

employees of the United States, having the control, receipt, custody, disposal, or payment of interest (except interest on deposits with persons carrying on the banking business paid to persons not engaged in business in the United States and not having an office or place of business therein), dividends, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income (but only to the extent that any of the above items constitutes gross income from sources within the United States), of any nonresident alien individual, or of any partnership not engaged in trade or business within the United States and not having any office or place of business therein and composed in whole or in part of nonresident aliens, shall (except in the cases provided for in subsection (a) of this section and except as otherwise provided in regulations prescribed by the Commissioner under section 215) deduct and withhold from such annual or periodical gains, profits, and income a tax equal to 15 per centum thereof, * * *

* * * * *

(26 U. S. C. 1940 ed., Sec. 143.)

SEC. 211 [As amended by Sec. 4, Revenue Act of 1940, *supra*]. TAX ON NONRESIDENT ALIEN INDIVIDUALS.—

(a) *No United States business or office*—(1) *General rule*—(A) *Imposition of tax.*—There shall be levied, collected, and paid for each taxable year, in lieu of the tax imposed by sections 11 and 12, upon the amount received, by every nonresident alien individual not engaged in trade or business within the United States and not having an

> office or place of business therein, from sources within the United States as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, a tax of 15 per centum of such amount, * * *.
>
> * * * * *
>
> (26 U. S. C. 1940 ed., Sec. 211.)
>
> SEC. 212. GROSS INCOME.
>
> (a) *General rule.*—In the case of a nonresident alien individual gross income includes only the gross income from sources within the United States.
>
> * * * * *
>
> (26 U. S. C. 1940 ed., Sec. 212.)

Treasury Regulations 103, promulgated under the income tax provisions of the Internal Revenue Code:

> SEC. 19.119–5. *Rentals and royalties.*—Gross income from sources within the United States includes rentals or royalties from property located within the United States or from any interest in such property, including rentals or royalties for the use of or the privilege of using in the United States, patents, copyrights, secret processes and formulas, good will, trademarks, trade brands, franchises, and other like property. The income arising from the rental of property, whether tangible or intangible, located within the United States, or from the use of property, whether tangible or intangible, within the United States, is from sources within the United States.

SEC. 19.143–2. *Fixed or determinable annual or periodical income.*—Only fixed or determinable annual or periodical income is subject to withholding. The Internal Revenue Code specifically includes in such income, interest, dividends, rent, salaries, wages, premiums, annuities, compensations, remunerations and emoluments. But other kinds of income are included, as, for instance, royalties.

Income is fixed when it is to be paid in amounts definitely predetermined. Income is determinable whenever there is a basis of calculation by which the amount to be paid may be ascertained. The income need not be paid annually if it is paid periodically; that is to say, from time to time, whether or not at regular intervals. That the length of time during which the payments are to be made may be increased or diminished in accordance with someone's will or with the happening of an event does not make the payments any the less determinable or periodical. A salesman working by the month for a commission on sales which is paid or credited monthly receives determinable periodical income. The share of the income of an estate or trust from sources within the United States which is distributable, whether distributed or not, or which has been paid or credited during the taxable year to a nonresident alien beneficiary of such estate or trust constitutes fixed or determinable annual or periodical income within the meaning of section 143 (b). The income derived from the sale in the United States of property, whether real or personal, is not fixed or determinable annual or periodical income. Such items as taxes, interest on mortgages, or premiums on insurance paid to or for the account

of a nonresident alien landlord by a tenant, pursuant to the terms of the lease, constitute fixed or determinable annual or periodical income.

SEC. 19.211–7. *Taxation of nonresident alien individuals.*—For the purposes of this section and sections 19.212–1, 19.213–1, 19.214–1, and 19.217–2, nonresident alien individuals are divided into three classes: (1) nonresident alien individuals not engaged in trade or business within the United States and not having an office or place of business therein at any time during the taxable year, and deriving in the taxable year not more than $21,600 gross amount of fixed or determinable annual or periodical income from sources within the United States; * * *

(*a*) ***No United States business or office—General rule.***—A nonresident alien individual within class (1), referred to in the preceding paragraph, is liable to the tax upon the amount received from sources within the United States, determined under the provisions of section 119, which is fixed or determinable annual or periodical gains, profits, and income. For the purposes of section 211 (a), the term "amount received" means "gross income." Specific items of fixed or determinable annual or periodical income are enumerated in the Internal Revenue Code as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensation, remunerations, and emoluments, but other fixed or determinable annual or periodical gains, profits, and income are also subject to the tax, as, for instance, royalties. As to the deter-

mination of fixed or determinable annual or periodical income, see section 19.143–2.

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SEC. 19.212–1. *Gross income of nonresident alien individuals.*— * * *

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(*a*) ***No United States business or office.***— The gross income of a nonresident alien individual not engaged in trade or business within the United States and not having an office or place of business therein at any time during the taxable year, whether such alien comes within section 211 (a) or section 211 (c), is gross income from sources within the United States consisting of fixed or determinable annual or periodical income. His taxable income does not include profits derived from the effecting of transactions in the United States in stocks, securities, or commodities (including hedging transactions) through a resident broker, commission agent, or custodian, or profits derived from the sale within the United States of personal property or real property located therein.

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SEC. 19.213–1. *Deductions allowed nonresident alien individuals*—(*a*) *No United States business or office*—(1) *General rule.*—In general, a nonresident alien individual not engaged in trade or business within the United States and not having an office or place of business therein at any time during the taxable year is not allowed any deductions, the tax being imposed upon the amount of gross income received.

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